Not To Be Published:

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

JOYCE M. RIKER-VANHOLLAND, Plaintiff, vs. TRANSOUTH FINANCIAL CORPORATION and ROBERT HUNTER, Defendants.	No. C04-4009-MWB **ORDER REGARDING DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT**

TABLE OF CONTENTS

I. INTRODUCTION

A. Factual Background

On a motion to dismiss, the court must assume all facts alleged in the plaintiff's complaint are true, and must liberally construe those allegations. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Therefore, the following factual background is drawn from the plaintiff's complaint[1] in such a manner.

On or about April 16, 2001, Thomas Riker[2] ("Riker") purchased a vehicle from Knoefler Chevrolet ("Knoefler"). Riker was obtaining the vehicle on behalf of his minor son, Chad Riker. At the time of the sale, Knoefler knew that the vehicle was for Chad Riker, and that Chad Riker did not reside with Riker at the time. Chad Riker, in fact, resided with his mother—plaintiff Joyce M. Riker-Vanholland ("Riker-Vanholland"). Knoefler assigned this debt to defendant Transouth Financial Corporation ("TFC").

Sometime in the summer of 2001, Riker defaulted on his obligation to TFC. After this default, TFC repeatedly called Riker-Vanholland and demanded money from her to satisfy Riker's delinquency—though TFC knew that Riker-Vanholland had no legal obligations with respect to the Riker-TFC loan and that Riker did not reside with her. Riker-Vanholland contends that the defendants called and harassed her, and her son, for this money on numerous occasions starting in July 2001. On September 9, 2001, TFC called Riker-Vanholland at work demanding money. At that point, the plaintiff informed TFC that the loan was not her responsibility, and that TFC should not call her anymore.

---

[1]In this instance the factual background is drawn from both the plaintiff's amended complaint, and second amended complaint. (Doc. Nos. 11 & 15).

[2]The court's prior order of May 7, 2004, assumed that Thomas Riker was the plaintiff's son—from later pleadings it has become clear that Thomas Riker is, in fact, the plaintiff's ex-husband.

Riker-Vanholland also wrote TFC a letter, dated September 9, 2001, in which she told TFC to stop calling her and harassing her about her ex-husband's loan, and gave TFC Riker's current address and phone number. Despite Riker-Vanholland's requests, on September 29, 2001, Mr. Robert Hunter, General Manager of TFC, called Riker-Vanholland and demanded money. Mr. Hunter was abusive to Riker-Vanholland during this conversation—he demanded to know personal information, called Riker-Vanholland and her son names, and threatened to have them arrested for bank fraud if they did not begin making payments. Though the defendants threatened Riker-Vanholland with bank fraud if she failed to make the requested payments, Riker-Vanholland never made any payments and charges were never filed. This pattern of abusive and harassing telephone calls by the defendants to Riker-Vanholland and her son continued through October 2001. The vehicle in question was reposessed in November 2001.

B. Procedural Background

On February 20, 2004, Riker-Vanholland, acting *pro se*, filed a complaint. (Doc. No. 1). The complaint, liberally construed, generally asserted claims for: (1) violation of the plaintiff's Civil Rights and Constitutional Rights; (2) civil RICO violations; (3) state law tort claims based on harassment, invasion of privacy and intimidation; (4) violation of federal and state debt collection laws; and (5) fraud. On April 2, 2004, the defendants filed a Motion to Dismiss. (Doc. No. 6). On May 7, 2004, this court entered an order granting the defendants' motion to dismiss as to the plaintiff's constitutional claim, civil RICO claim and state law tort claim, and denying the motion as to the plaintiff's claims for fraud and violation of the Iowa Debt Collections Practices Act, IOWA CODE § 537.7101, *et seq.* ("IDCPA"). (Doc. No. 9). This court's order also allowed Riker-Vanholland time in which to file an amended complaint adequately pleading fraud pursuant

to Federal Rule of Civil Procedure 9(b), specifically alleging a cause of action under the IDCPA, and adequately asserting diversity jurisdiction under 28 U.S.C. § 1332(a). *Id*.

On May 14, 2004, Riker-Vanholland filed her Amended Complaint Demand for Jury Trial. (Doc. No. 11). The amended complaint alleged three causes of action: (1) civil RICO; (2) fraud; and (3) IDCPA. (Doc. No. 11). On May 20, 2004, the defendants filed a Motion to Dismiss Amended Complaint—which is currently before the court for resolution. (Doc. No. 12). On June 7, 2004, Riker-Vanholland filed a Notice of Appeal of the court's order of May 7, 2004.[3] (Doc. No. 13). Seemingly in response to the deficiencies alleged in the defendants' motion to dismiss, Riker-Vanholland filed a second amended complaint[4] on June 23, 2004. (Doc. No. 15). In light of the second amended complaint, the court granted the defendants additional time in which to file a supplemental brief on how, if at all, the second amended complaint affected their arguments for dismissal. (Doc. No. 17). On July 12, 2004, the defendants filed such a supplemental brief. (Doc. No. 18). On July 15, 2004, Riker-Vanholland filed her resistance to the defendants' motion to dismiss.[5] (Doc. No. 19). The matter is now fully submitted and ready for resolution by this court.

---

[3]Though Riker-Vanholland filed her Notice of Appeal on May 7, 2004, the filing fees for such appeal were not received by the Eighth Circuit until June 28, 2004. (Doc. No. 16).

[4]Though it is actually a second amended complaint, the title of the filing is "Amended Complaint Demand for Jury Trial." (Doc. No. 15).

[5]Actual title of the filing is "Response to the Defendant Motion." (Doc. No. 19).

II. LEGAL ANALYSIS

A. Standards For Motions To Dismiss

Federal Rule of Civil Procedure 12(b)(6) authorizes the district courts to dismiss any complaint which fails "to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). Rule 12(b)(6) affords a defendant an opportunity to test whether, as a matter of law, the plaintiff is entitled to legal relief even if everything alleged in the complaint is true. Under this standard, a complaint should be dismissed only where it appears that the plaintiff can prove no set of facts in support of its claim which would entitle it to relief. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Knapp v. Hanson*, 183 F.3d 786, 788 (8th Cir. 1999) ("A motion to dismiss should be granted only if 'it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him to relief."') (quoting *Morton v. Becker*, 793 F.2d 185, 187 (8th Cir. 1986), and citing *Conley v. Gibson*, 355 U.S. 41, 45- 46 (1957)). In applying this standard, the court must presume all factual allegations in the complaint as true and draw all reasonable inferences in favor of the non-moving party. *E.g.*, *Whitmore v. Harrington*, 204 F.3d 784, 784 (8th Cir. 2000); *accord Cruz v. Beto*, 405 U.S. 319, 322 (1972); *Anderson v. Franklin County, Mo.*, 192 F.3d 1125, 1131 (8th Cir. 1999); *Gross v. Weber*, 186 F.3d 1089, 1090 (8th Cir. 1999); *Midwestern Mach., Inc. v. Northwest Airlines, Inc.*, 167 F.3d 439, 441 (8th Cir. 1999); *Valiant- Bey v. Morris*, 829 F.2d 1441, 1443 (8th Cir. 1987). The court need not, however, accord the presumption of truthfulness to any legal conclusions, opinions or deductions, even if they are couched as factual allegations. *Silver v. H & R Block, Inc.*, 105 F.3d 394, 397 (8th Cir. 1997) (citing *In re Syntex Corp. Securities Lit.*, 95 F.3d 922, 926 (9th Cir. 1996)); *Westcott v. City of Omaha*, 901 F.2d 1486, 1488 (8th Cir. 1990) (the court "do[es] not, however, blindly accept the legal conclusions drawn by the pleader from the facts," citing *Morgan v. Church's Fried Chicken*, 829 F.2d 10, 12 (6th Cir. 1987), and

5 Charles A. Wright *et al.*, FEDERAL PRACTICE AND PROCEDURE § 1357, at 595-97 (1969)); *see also LRL Props. v. Portage Metro Hous. Auth.*, 55 F.3d 1097, 1103 (6th Cir. 1995) (the court "need not accept as true legal conclusions or unwarranted factual inferences," quoting *Morgan*, 829 F.2d at 12).

In this case the plaintiff is acting *pro se*. "In the context of a motion to dismiss for failure to state a claim under [Rule 12(b)(6)], a pro se complaint must be liberally construed." *Blomberg v. Schneiderheinz*, 632 F.2d 698, 699 (8th Cir. 1980); *see also Smith v. St. Bernards Reg. Med. Ctr.*, 19 F.3d 1254, 1255 (8th Cir. 1994). "[A] court should not dismiss [a *pro se*] complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Valiant-Bey v. Morris*, 829 F.2d 1441, 1443 (8th Cir. 1987)(quotes and citation omitted). Further, as the Federal Rules contemplate a "liberal system of notice pleading," to survive a motion to dismiss, the plaintiff is required only to plead a factual basis from which inferences supporting the legal conclusions the complaint seeks can arise. *Kohl v. Casson,* 5 F.2d 1141, 1148 (8th Cir. 1993); *Simpson v. Iowa Health Sys.*, 2001 WL 34008480 at *5 (N.D. Iowa Aug. 22, 2001). With these principles in mind, the court now turns to an analysis of the defendants' motion to dismiss.

B. Civil RICO

In her original complaint, Riker-Vanholland asserted a civil RICO claim under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.*—which imposes civil and criminal liability on persons engaged in certain prohibited activity. The defendants attacked the civil RICO claim in their original motion to dismiss, and on May 7, 2004, this court dismissed the civil RICO claim finding that Riker-Vanholland had failed to allege any qualifying predicate acts that would establish a pattern of racketeering. Order

Regarding Defendants' Motion to Dismiss, Doc. No. 9, at 5-6. Riker-Vanholland subsequently filed a notice of appeal of the dismissal of her claims, implicitly including the dismissal of her civil RICO claim. *See* Notice of Appeal, Doc. No. 13. The filing of her appeal divests this court of jurisdiction over those claims at issue in the appeal—including the civil RICO claim. *See Hunter v. Underwood*, 362 F.3d 468, 475 (8th Cir. 2004). Therefore, unless and until the Eighth Circuit Court of Appeals reverses this court's order dismissing the civil RICO claim, the court has no jurisdiction over any civil RICO claim asserted by Riker-Vanholland in either her amended complaint or second amended complaint. Therefore, the defendants' motion to dismiss the civil RICO claim alleged in the amended complaint is **granted**.

C. Fraud

The defendants assert that Riker-Vanholland's recent attempt to articulate a claim for fraud fails on two levels—procedural and substantive. Procedurally, the defendants claim that Riker-Vanholland has failed to adequately allege fraud with particularity as required by Federal Rule of Civil Procedure 9(b). Substantively, the defendants assert that Riker-Vanholland is unable to prove the reliance requirement of a common law fraud claim. Specifically, the defendants argue that Riker-Vanholland asserts only that Mr. Hunter "tried" to extort money from her, but was never successful—hence, according to the defendants, no reliance can be found under any set of facts alleged.

Under Iowa law, to establish fraud the following elements must be shown : (1) a representation; (2) falsity; (3) materiality; (4) scienter; (5) intent to deceive; (6) reliance; and (7) resulting injury and damages. *Sedgwick v. Bowers*, 681 N.W.2d 607, 610-11 (Iowa 2004) (citing *Robinson v. Perpetual Servs. Corp.*, 412 N.W.2d 562, 565 (Iowa 1987)); *see also Gibson v. ITT Hartford Ins. Co.*, 621 N.W.2d 388 (Iowa 2001); *Beeck v. Kapalis*,

302 N.W.2d 90 (Iowa 1981). The first, second, and third elements (representation, falsity, and materiality) are sometimes consolidated and treated as a single element referred to as fraudulent misrepresentation. *Arthur v. Brick*, 565 N.W.2d 623, 625 (Iowa Ct. App. 1997). The plaintiff must prove these elements by a preponderance of clear, satisfactory, and convincing evidence. *Sedgwick*, 681 N.W.2d at 611. Further, fraud must be plead with the particularity required by Rule 9(b). *See Independent Business Forms v. A-M Graphics*, 127 F.3d 698, 703 n.2 (8th Cir. 1997); *see also Roberts v. Francis*, 128 F.3d 647, 651 (8th Cir. 1997) ("Under Rule 9(b), '[i]n all averments of fraud . . . the circumstances constituting fraud . . . shall be stated with particularity.'"). "When pleading fraud, a plaintiff cannot simply make conclusory allegations." *Roberts*, 128 F.3d at 651 (citing *Commercial Property Inv., Inc. v. Quality Inns Int'l*, 61 F.3d 639, 644 (8th Cir.1995)). The court will now analyze Riker-Vanholland's fraud claim in light of these requirements.

The 'reliance' element requires both that Riker-Vanholland relied on the truth of a statement made by the defendants, and that this reliance was justified. *See Webster Indus., Inc. v. Northwood Doors, Inc.*, 320 F. Supp. 2d 821, 844 (N.D. Iowa 2004) (quoting *Gibson*, 621 N.W.2d at 400). In her amended complaint, Riker-Vanholland, in claiming fraud, asserted only "The Defendant tried to extort money from Riker-Vanholland claiming Bank fraud with no intention to file any charges on anyone." Amended Complaint, Doc. No. 11, at 4. In her second amended complaint, Riker-Vanholland claimed the following in attempting to assert a claim for fraud:

> By the numerous times TFC called the plaintiff knowing she had no legal obligation to her ex-husband loan to extort money or promising Bank Fraud Charges with no intent to deliver upon that promise, perpetrated fraud on Vanholland.

Second amended complaint, Doc. No. 15, at 1-2. In her response to the defendants'

motion to dismiss the amended complaint, Riker-Vanholland argued:

> TFC hibitual calls to the Polaintiff to extort money or be charged with Bank Fraud. TFC set-up and agreement Pay this loan or be charged with Bank fraud. An Agreement is of course essential to be an valid contract., but the law imputes to a person an intention corresponding to the reasonable meaning of his words and acts. If his words and acts judged by a reasonable standard manifest an intention to agree. its an agreement 17 C.J.S. Contract § 32 p361: 12 AM Jur, Contracts 19, p 515. Pay this loan or Bank Fraud charges. TFC made this agreement with no intention to deliver upon that agreement, it preprated FRAUD!

Response to the Defendant Motion, Doc. No. 19, at 1-2 ("Resistance").

Accepting the allegations as true, the defendants' conduct, while grossly inappropriate and hardly palatable, cannot amount to fraud absent reliance by Riker-Vanholland on the defendants' threats. Throughout her pleadings, Riker-Vanholland has discussed the harassing and disturbing nature of the defendants' threats to file bank fraud charges against her if she did not start making payments on her ex-husband's defaulted loan, and how emotionally damaging and disturbing these threats were—however, never once has Riker-Vanholland alleged that she acted in reliance on these statements in any way. Further, Riker-Vanholland has clearly failed to allege fraud with the particularity required by Rule 9(b). It is difficult for even some of the most seasoned attorneys to adequately plead fraud with Rule 9(b) particularity, so it comes as no surprise that Riker-Vanholland, a *pro se* litigant, has found the task daunting. Were deficient pleading the only challenge to the fraud claim, the court would likely have given Riker-Vanholland another opportunity to amend her complaint. However, Riker-Vanholland has also failed to assert any facts which would support her reliance on the defendants' fraudulent statements. In such a situation, where the plaintiff has failed to allege any set of facts upon

which relief could be granted in spite of the most liberal possible reading of the complaint, the defendants are entitled to dismissal of the claim. Therefore, the defendants' motion to dismiss as to the fraud claim is **granted**.

D. Subject Matter Jurisdiction

Subject matter jurisdiction in this instance is purportedly grounded in diversity jurisdiction under 28 U.S.C. § 1332. For diversity jurisdiction to exist, two requirements must be met: (1) complete diversity of the parties; and (2) an amount in controversy in excess of $75,000.00. *See id.* The defendants allege that nothing in the complaint would raise the inference that the amount in controversy can be met—especially in light of the fact that damages for Riker-Vanholland's IDCPA claim, the only claim remaining in this action, are statutorily capped at actual damages plus no more than $1,000.00. In response, Riker-Vanholland simply asserts that "[v]enue in this court is proper because the Plaintiff believes after the jury hears the evidence of TFC and Hunters action they will award more than $75,000." Resistance at 1.

The court must first look to the face of the complaint to determine the sum or value in controversy. This controls unless it appears or it is established that the amount is not claimed in good faith, that is, that it appears "'to a legal certainty the claim is really for less than the jurisdictional amount.'" *Horton v. Liberty Mut. Ins. Co.*, 367 U.S. 348, 353, 81 S. Ct. 1570, 1573, 6 L. Ed. 2d 890 (1961) (quoting *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 289, 58 S. Ct. 586, 590, 82 L. Ed. 845 (1938)). As was said in the leading case of *St. Paul Mercury Indemnity Co. v. Red Cab Company*, 303 U.S. 283, 288-289, 58 S. Ct. 586, 590, 82 L. Ed. 845 (1938):

> The rule governing dismissal for want of jurisdiction in cases brought in the federal court is that, unless the law gives a

> different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal. The inability of plaintiff to recover an amount adequate to give the court jurisdiction does not show his bad faith or oust the jurisdiction. Nor does the fact that the complaint discloses the existence of a valid defense to the claim. But if, from the face of the pleadings, it is apparent, *to a legal certainty*, that the plaintiff cannot recover the amount claimed or if, from the proofs, the court is satisfied to a like certainty that the plaintiff never was entitled to recover that amount, and that his claim was therefore colorable for the purpose of conferring jurisdiction, the suit will be dismissed.

Id. Therefore, in order for the defendants to be entitled to the dismissal of Riker-Vanholland's IDCPA claim on these grounds, it must be " clear that [the IDCPA] claim never could have amounted to the sum necessary to give jurisdiction." *Id.* at 290, 58 S. Ct. 586.

Iowa Code § 537.5201 provides the following concerning the damages a consumer is entitled to for a IDCPA violation:

> The consumer, . . . , has a cause of action to recover actual damages and in addition a right in an action other than a class action to recover from the person violating this chapter a penalty in an amount determined by the court, but not less than one hundred dollars nor more than one thousand dollars . . . .

IOWA CODE § 537.5201(1) (2004); *see also id.* § 537.5201(1)(y) (enumerating the IDCPA as one of the acts to which this provision is applicable). Where a violation has been established, the consumer is also awarded reasonable costs and attorneys' fees. *Id.* § 537.5201(8). While the Iowa Supreme Court has held that consumers are permitted to bring actions for violation of the IDCPA even where they have suffered no actual damages,

Public Finance Co. v. Van Blaricome, 324 N.W.2d 716, 725 (Iowa 1982), it is clear that damages are limited to actual damages and up to a $1000.00 penalty. *See* IOWA CODE § 537.5201(1)(y); *Public Finance Co.*, 324 N.W.2d at 725-26. As Riker-Vanholland has not alleged any actual damages stemming from the defendants threatening phone calls, under the best possible reading of the facts asserted, the IDCPA would net a damage award of $1000.00 at the very most. This is insufficient to support an exercise of diversity jurisdiction over the IDCPA claim by this court. Therefore, the defendants' motion to dismiss the IDCPA claim is **granted**, **and the IDCPA claim is dismissed without prejudice to refiling in Iowa state court**.

III. CONCLUSION

For the reasons outlined above, the defendants' motion to dismiss the amended complaint is **granted.** However, **the dismissal of the IDCPA claim for lack of subject matter jurisdiction is without prejudice**, and Riker-Vanholland can refile her claim in the appropriate Iowa state court pursuant to the Iowa "failure of action" statute. *See* IOWA CODE § 614.10.[6]

---

[6] The Iowa "failure of action" statute provides:

> If, after the commencement of an action, the plaintiff, for any cause except negligence in its prosecution, fails therein, and a new one is brought within six months thereafter, the second shall, for the purposes herein contemplated, be held a continuation of the first.

IOWA CODE § 614.10. Therefore, Riker-Vanholland's IDCPA claim is preserved if she brings it in the appropriate Iowa state court within six months of the date of this order. Further, the court cautions Riker-Vanholland that the appropriate state court for the IDCPA claim may be the district court sitting in small claims if the amount recoverable is (continued…)

IT IS SO ORDERED.

DATED this 13th day of August, 2004.

Mark W. Bennett

MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA

[6](…continued)
less than $5,000.00. *See* IOWA CODE § 631.1.